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No. 88-430

In the Supreme Court of the United States

OCTOBER TERM, 1988

GERALD DRASEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment on the ground that the federal firearms statute in question did not cover unassembled rifles that had never been assembled.

In 1986, petitioners were charged in six counts of an indictment returned in the United States District Court for the Northern District of Illinois. The indictment charged them with unlawfully dealing in and transferring short-barrel rifles, in violation of 26 U.S.C. 5861. On January 15, 1987, the district court dismissed those counts on the ground that the statute, 26 U.S.C. 5861, does not cover unassembled and never-before-assembled short barrel rifle parts. The court held that such parts are not included within the plain language of the statutory definition of "rifle" in 26 U.S.C. 5845(c), which includes any "weapon which may be readiiy restored to fire a fixed cartridge." The court also found that the statute did not give fair notice to petitioners that their conduct was illegal (Pet. App. 36-52, 21-35).

The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33. The court concluded that Congress, in the 1968 reenactment of the statute, intended to adopt the administrative construction of existing law. The court recognized that while the added language "readily restored" in the reenactment is somewhat ambiguous, Congress gave no indication that it adopted this clause in order to add some unexplained exception to the prior administrative construction. Pet. App. 7-11. The court also held that a commonsense reading of the statute, combined with the Commissioner's ruling, provides sufficient fair warning in a highly regulated business. *Id.* at 13-14.

Petitioners contend (Pet. 5-16) that unassembled and never-before-assembled constituent parts of a rifle are not a short-barrel rifle within the meaning of 26 U.S.C. 5845, as defined in 26 U.S.C. 5845(c). Petitioners also contend (Pet. 16-20) that the construction of the statute by the court of appeals denied them their due process right to fair notice that their conduct was criminal. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their statutory and due process arguments to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against

them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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